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and Joseph Peter Slaga

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

DAVID ZAITZEFF, an individual on
his own behalf and on behalf of the
State of California Labor and
Workforce Development Agency as a
Private Attorney General,

Plaintiff,

vs.

PEREGRINE FINANCIAL GROUP,
INC., an Iowa Corporation, JOSEPH
PETER SLAGA, an individual; and
DOES 1-10, inclusive,

Defendants.

CASE NO. CV08-02874-MMM

**DEFENDANTS' REPLY
MEMORANDUM IN FURTHER
SUPPORT OF THEIR MOTION TO
DISMISS COMPLAINT FOR
IMPROPER VENUE OR IN THE
ALTERNATIVE FOR A TRANSFER OF
VENUE AND PETITION TO COMPEL
ARBITRATION**

Hearing Date: June 23, 2008
Time: 10:00 A.M.
Judge: Hon. Margaret M. Morrow
Courtroom: Roybal 780

As and for their Reply Memorandum in further support of their Motion to
Dismiss the Complaint for Improper Venue or in the alternative for a Transfer of
Venue and to Compel Arbitration, Defendants state the following.

I.

Zaitzeff Cannot Avoid the IllinoisForum Selection Clause

The forum selection clause in the Associated Person Agreement between Zaitzeff and PFG is valid and should be enforced. Whether Zaitzeff terminated his relationship with PFG after his alleged claims arose is immaterial. In *Oldlaw Corp. v. Allen*, 2007 WL 2772697 (C.D. Ill. Sept. 24, 2007), the court considered and rejected the same argument made by Zaitzeff here, i.e., that termination of the agreement also terminated its forum selection clause. Such an interpretation of a contract would be nonsensical. In *Oldlaw*, the court stated, “Nonsensical interpretations of contracts are disfavored. Not because of a judicial aversion to nonsense as such, but because people are unlikely to make contracts that they believe will have absurd consequences.” *Oldlaw*, 2007 WL 2772697, at *5, citing and quoting from, *Future Source LLC v. Reuters, Ltd.*, 312 F.3d 281, 284 (7th Cir. 2002). Instead, as *Oldlaw* explained, “Plaintiff’s causes of action arise from obligations accrued before the Agreement’s termination. The venue clause merely determines where the litigation over those obligations belongs.” 2007 WL 2772697, at *4.

Here, Zaitzeff concedes the authenticity of the Agreement he signed and which is attached to the original Declaration of Rebecca Wing. Zaitzeff Decl., Par. 2. He bases his lawsuit on purported statutory rights he claims as an alleged former employee of PFG; but, any such rights existed, if at all, prior to the termination of that relationship. As in *Oldlaw*, the forum selection clause determines where litigation over those alleged rights belongs. Otherwise, the forum selection clause never would have application insofar as a contract is deemed terminated when one party sues the other for damages arising from its breach. See, e.g., *Eager v. Berke*, 142 N.E.2d 36, 38-39 (Ill. 1957).

Zaitzeff’s underlying claims are without merit. Despite his assertion to the contrary, Zaitzeff was an independent contractor, not an employee of PFG. As the

1 Agreement itself states, “Independent Contractor Status. [Zaitzeff] acknowledges that
 2 he has been offered employment but has declined to be employed by PFG, choosing to
 3 be retained by PFG on an independent contractor basis.” Agreement, at page 5,
 4 Exhibit “A” ¶ 4 (emphasis in original). This page was signed by Zaitzeff and dated in
 5 his own hand. Each page of the Agreement was initialed or executed by Zaitzeff. At
 6 the last page of the Agreement, Exhibit “B” thereto, Zaitzeff wrote in his own hand the
 7 names of customers to be carved out of his post-termination non-compete covenant.
 8 Therefore, the Agreement itself defies Zaitzeff’s conclusory and unsupported statement
 9 that the Agreement was presented to him on a take it or leave it basis. See also, Reply
 10 Declaration of Joseph Peter Slaga, at ¶¶ 3-5; and Reply Declaration of Rebecca Wing,
 11 at ¶¶ 5-7.

12 Nor can Zaitzeff avoid an Illinois forum by arguing that he was an
 13 employee and not an independent contractor. The forum selection clause applies to all
 14 claims “arising directly or indirectly in connection with, out of, or related to or from
 15 this Agreement, [or] *any other agreement* between [Plaintiff] and [Defendant], whether
 16 or not initiated by [Defendant]...” (emphasis supplied). Under both Illinois and
 17 California law, an employment-by-will relationship is a form of agreement. *See, e.g.,*
 18 *Klein v. Caremark International, Inc.*, 771 N.E.2d 1, 13 (Ill.App. 2002); *Dore v.*
 19 *Arnold Worldwide, Inc.*, 139 P.2d 56, 60 (Cal. 2006). Therefore, the forum selection
 20 clause applies to any litigation, including this one, regarding the parties’ respective
 21 rights and obligations arising out of either an employment or independent contractor
 22 relationship between Zaitzeff and PFG.

23 The forum selection clause applies to *all* claims arising out of either form
 24 of agreement between the parties, even claims that are not for breach of contract. In
 25 *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988), the Ninth
 26 Circuit rejected the argument that a forum selection clause applies only to breach of
 27 contract claims, concluding instead that such a clause applies to any claim that “relates
 28 to interpretation of the contract.” 858 F.2d at 514. In the case at bar, Zaitzeff’s claims

1 relate to the interpretation of his Agreement, including whether he was an independent
2 contractor, as Defendants contend and as the Agreement itself states.

3 Zaitzeff's reliance on *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th
4 Cir. 2006) is misplaced. In *Nagrampa*, both parties proceeded "on the assumption that
5 the franchise agreement is governed by California law...." 469 F.3d at 1267. In the
6 case at bar, the Agreement is governed by Illinois law. Agreement, at Par. 17 ("This
7 Agreement shall be governed by the laws of the State of Illinois.") California law
8 regarding unconscionability of a forum selection clause, as applied by the Ninth Circuit
9 in *Nagrampa*, has no bearing on this case. Moreover, in *Nagrampa*, the plaintiff had
10 no reasonable expectation that she had agreed to an out-of-state forum because she had
11 received documentation from the defendants stating that a clause imposing such a
12 forum may be unenforceable. 469 F.3d at 1290. In the case at bar, Zaitzeff signed the
13 Agreement explicitly designating Illinois as the forum and received no contrary
14 documentation from Defendants. Therefore, *Nagrampa* is inapposite.

15 As already stated in the Motion, federal law governs the enforceability of
16 the forum selection clause because this case presents a federal question. Zaitzeff
17 wholly fails to distinguish the federal case law relied upon by Defendants in their
18 Motion. Likewise, Illinois law, the body of law that governs the Agreement, upholds
19 such forum selection clauses. *Muzmudar v. Wellness International Network, Inc.*, 438
20 F.3d 759, 761 (7th Cir. 2006) ("under either federal or Illinois law, forum selection
21 clauses are valid and enforceable"); *Dace International, Inc. v. Apple Computer, Inc.*,
22 655 N.E.2d 974 (1st Dist. 1995) (enforcing clause in contract between California
23 manufacturer and Illinois sales consultant requiring that all disputes be heard in
24 California); *Calanca v. D&S Manufacturing Co.*, 510 N.E.2d 21 (1st Dist. 1987)
25 (enforcing forum selection clause contained in employment agreement and requiring
26 Illinois employee to litigate claims against former employer in Wisconsin).

27 Zaitzeff further misstates the holding of *Murphy v. Schneider National,*
28 *Inc.*, 362 F.3d 1133 (9th Cir. 2004). In *Murphy*, the court held that, if the party

1 resisting enforcement of a forum selection clause presents evidence sufficient to
2 overcome the strong presumption in favor of such a clause, the court *may*, in its
3 discretion, hold an evidentiary hearing to resolve disputed facts. “Whether to hold a
4 hearing on disputed facts and the scope and method of the hearing is within the sound
5 discretion of the district court.” 362 F.3d at 1139. Therefore, Zaitzeff has no right to a
6 jury trial on his efforts to avoid the forum selection clause. Indeed, under *Murphy*, the
7 court need not hold any form of evidentiary hearing.

8 Zaitzeff cannot overcome the strong presumption in favor of validity of
9 the forum selection clause. The case law that he relies upon does not support his
10 position. In *Becker*, the court held that plaintiff’s assertions regarding the parties’
11 unequal bargaining power were insufficient to overcome the presumptive validity of
12 the forum selection clause; however, the court also held that his specific evidence
13 regarding both his financial and physical limitations should have been considered by
14 the district court. 362 F.3d at 1141-43. In *Bolter v. Superior Court*, 87 Cal. App. 4th
15 900 (Cal. App. 2001), plaintiffs presented evidence that they were self-employed and
16 ran one-person businesses which required them to remain close to home or lose much
17 of their business; one plaintiff cared for her husband who was severely ill and could
18 not get by in her absence. 87 Cal. App. 4th at 909.

19 In his Declaration, Zaitzeff offers no facts supporting his assertions of
20 unequal bargaining power. His approach should be unavailing pursuant to *Becker*.
21 Indeed, conclusory assertions of financial inconvenience are insufficient under
22 *Spradlin v. Lear Siegler Management Services, Inc.*, 926 F.2d 865, 867-68 (9th Cir.
23 1991). Zaitzeff concedes he suffers none of the physical hardships that were
24 significant factors in *Becker* and *Bolter*. He contends his financial status is “very
25 poor;” however, he offers no evidence to support this bare statement. Although his
26 attorney produces evidence of what PFG paid Zaitzeff for the intermittent contract
27 work done for PFG, Zaitzeff offers no evidence regarding regular income from other
28 sources or other assets at his disposal. Therefore, the Declarations of Zaitzeff and his

1 attorney should be disregarded on this point as not being well-supported by evidence.

2 Based on the foregoing, the court should grant the motion to dismiss for
3 improper venue or in the alternative transfer the case to the Northern District of Illinois
4 pursuant to the parties' forum selection clause.

5 II.

6 The Arbitration Issue Has No Bearing on the
7 Validity of the Forum Selection Clause

8 The validity and enforceability of the forum selection clause is an issue
9 separate and distinct from whether Zaitzeff is obligated to arbitrate his claims against
10 Defendants. PFG did file a Statement of Claim against Zaitzeff in NFA arbitration.
11 That Statement of Claim seeks reimbursement for a deficit in one of Zaitzeff's
12 customer's accounts and other damages, a ruling that Zaitzeff was an independent
13 contractor and not an employee of PFG and a ruling that he was not entitled to any
14 offsets against the amount he owes PFG based upon the alleged violations of federal
15 and state law that are contained in his instant Complaint.

16 Since filing the instant motion, PFG has learned the NFA will not compel
17 Zaitzeff to arbitrate PFG's declaratory judgment claims. While Zaitzeff is required to
18 arbitrate PFG's claim against him for reimbursement for the account deficit, that issue
19 is not presently before this Court.

20
21 DATED: June 13, 2008 **JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.**
22 Michael J. Abbott

23 By: /s/ Michael J. Abbott

24 Michael J. Abbott
25 Attorneys for Defendants Peregrine Financial Group, Inc.,
26 and Joseph Peter Slaga
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REPLY DECLARATION OF REBECCA J. WING

I, Rebecca J. Wing, hereby declare:

1. I have personal knowledge of the facts set forth herein and would and could testify competently thereto if sworn as a witness.

2. I am the General Counsel of Peregrine Financial Group, Inc. (“PFG”), whose principal place of business is located in Chicago, Illinois. PFG is a registered Futures Commission Merchant and Member of the National Futures Association.

3. Defendant Joseph Peter Slaga is an employee of PFG and is the branch manager of its Camarillo, California office.

4. From March 20, 2006 through his resignation on March 2, 2008, David Zaitzeff was an Associated Person of PFG and was registered with the NFA as an Associate. Within the futures industry, such Associates are referred to colloquially as “Associate Members.”

5. The Associated Person Agreement between PFG and Zaitzeff was not presented to Zaitzeff on a take-it-or-leave-it basis. The Agreement states at Exhibit “A” that Zaitzeff was given an opportunity to become a PFG employee but declined and chose to be retained by PFG as an independent contractor instead.

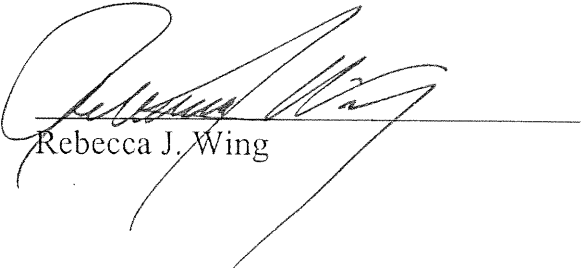
6. As General Counsel I review every employment or independent contractor agreement entered into by PFG. It is a common occurrence for some Associated Persons of PFG to decline PFG’s offer of employment and choose to be

1 retained as independent contractors instead. Associated Persons affiliated with
2 brokerage firms often choose to operate their activities as a separate business in order
3 to take advantage of above-the-line income tax deductions that would not be available
4 to them if they were employees of the firms.

5
6 7. Currently affiliated with PFG's Camarillo, California office are five
7 Associated Persons, two of whom accepted PFG's offer to become employees of PFG
8 and three of whom declined that offer, choosing to be retained as independent
9 contractors instead.

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11 I declare under penalty of perjury, under the laws of the State of
12 California, that the foregoing is true and correct.

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14 Dated: June 12, 2008

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16 Rebecca J. Wing
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REPLY DECLARATION OF JOSEPH PETER SLAGA

I, Joseph Peter Slaga, hereby declare:

1. I have personal knowledge of the facts set forth herein and would and could testify competently thereto if sworn as a witness.

2. I am an employee of Peregrine Financial Group, Inc. ("PFG") and the branch manager of its Camarillo, California office.

3. From March 20, 2006 through his resignation on March 2, 2008, David Zaitzeff was an Associated Person of PFG and was registered with the NFA as an Associate. During that time period, Zaitzeff worked as an independent contractor of PFG and not as an employee.

4. On or about March 20, 2006, I offered Zaitzeff employment with PFG. Zaitzeff declined employment with PFG and elected instead to work as an independent contractor. Therefore, I offered Zaitzeff for his consideration and review an Associated Person Agreement which stated on Exhibit "A" that he had been offered employment by PFG but declined to be employed by PFG, choosing to be retained instead as an independent contractor.

5. I did not present the Associated Person Agreement to Zaitzeff on a take-it-or-leave-it basis. In addition to Zaitzeff's choice to be retained as an independent contractor, Zaitzeff also identified customers who were to be carved out of the covenant not to compete that would apply following the termination of his agreement. Zaitzeff reviewed and initialed the bottom of each page, signed the Agreement, signed again at the bottom of Exhibits "A" and "B" and wrote in his own

1 hand the names of customers to be carved out of his covenant not to compete on
2 Exhibit "B." Zaitzeff never asked to change any of the Agreement's terms prior to
3 executing the Agreement.
4

5 I declare under penalty of perjury, under the laws of the State of
6 California, that the foregoing is true and correct.
7

8 Dated: June 12, 2008

9 
Joseph Peter Slaga